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EXAMINER

KIDWELL, MICHELE M

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES R. GROSS, BRIAN E. BOEHMER,
JOHN P. ERSPAMER, and JOHN PERRY BAKER

Appeal 2008-002545¹
Application 09/774,248
Technology Center 3700

Decided: November 12, 2009

Before DEMETRA J. MILLS, MELANIE L. McCOLLUM, and
STEPHEN WALSH, *Administrative Patent Judges*.

McCOLLUM, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to an absorbent article. The Examiner has rejected the claims as anticipated or obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

¹ Oral Hearing held October 22, 2009.

STATEMENT OF THE CASE

Claims 1-13, 29, 30, 35, and 36 are on appeal (App. Br. 2).² We will focus on claims 1, 7, and 12, which read as follows:

1. An absorbent core comprising:
 - (1) an acquisition layer;
 - (2) a storage layer having absorbent capacity, disposed beneath and in fluid communication with the acquisition layer, and
 - (3) a wicking layer disposed beneath and in fluid communication with the storage layer, comprising compressible hardwood pulp and having a density of between about 0.05 and about 0.4 g/cc, where the ratio of the vertical wicking height of the wicking layer to the vertical wicking height of the storage layer is equal to or greater than 1.25.
7. The absorbent core of one of claims 1 [sic], wherein the core has a rewet value of about 3.0 g or less.
12. An absorbent article comprising:
 - (A) a liquid permeable top sheet,
 - (B) a liquid impermeable back sheet, and
 - (C) an absorbent core disposed between the topsheet and the backsheet, comprising:
 - (1) an acquisition layer disposed beneath and in fluid communication with the topsheet;
 - (2) a storage layer having absorbent capacity disposed beneath and in fluid communication with the acquisition layer, and
 - (3) a wicking layer disposed beneath and in fluid communication with the storage layer, comprising compressible hardwood pulp and having a density of between 0.05 and 0.4 g/cc, where the ratio of the vertical wicking height of the wicking layer to the vertical wicking height of the storage layer is equal to or greater than 1.25.

² According to the Appeal Brief, claims 14-28, 31-34, and 37-42 have been canceled (App. Br. 2). However, the Amendment canceling these claims was not entered by the Examiner. Thus, these claims remain pending, albeit withdrawn from consideration by the Examiner. (2/22/2005 Advisory Action.)

The Examiner relies on the following references:

Aziz	US 4,324,247	Apr. 13, 1982
Hammons et al.	US 5,647,863	Jul. 15, 1997
Georger et al.	US 5,919,177	Jul. 6, 1999

Claims 1-6, 10-13, 29, 30, 35, and 36 stand rejected under 35 U.S.C. § 102(b) as anticipated by Hammons (Ans. 3).

Claims 7-9 stand rejected under 35 U.S.C. § 103(a) as obvious over Hammons (Ans. 7).

ANTICIPATION

The Examiner finds that Hammons discloses:

an absorbent core (abstract) comprising an acquisition layer (38), a storage layer (44) having absorbent capacity (col. 9, lines 10 - 18), disposed beneath and in fluid communication with the acquisition layer (figure 3) and a wicking layer (46,48) disposed beneath and in fluid communication with the storage layer (figure 3), comprising compressible hardwood pulp (col. 12, lines 16 - 28) and having a density of between about 0.05 and about 0.4 g/cc (col. 15, lines 3 - 6) where the ratio of the vertical wicking height of the wicking layer to the vertical wicking height of the storage layer is equal to or greater than 1.25 as set forth in col. 11, lines 11 - 15.

(Ans. 3-4.)

Appellants argue that “the Examiner has erroneously aligned the topsheet (38) in Hammons with the acquisition layer of the claimed invention, and further has erroneously aligned the storage layer and indicator member (46, 48) with the wicking layer of the claimed invention” (App. Br. 7).

Appellants also argue that the Examiner erred by “interpret[ing] a layer one way to reject one independent claim, and then interpret[ing] the layer in another way to reject a different independent claim” (*id.* at 9).

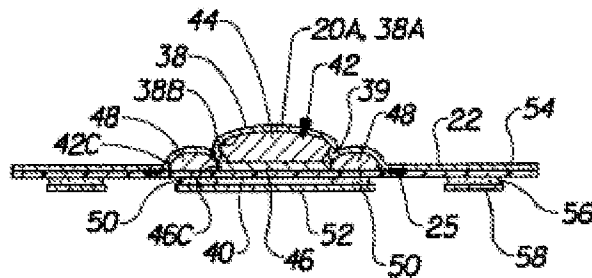
Issues

Have Appellants shown that the Examiner erred in finding that Hammons anticipates claim 1?

Have Appellants shown that the Examiner erred by considering different layers of Hammons’ structure to fulfill the limitations of the same claim term in different independent claims?

Findings of Fact

1. Hammons Figure 2 is reproduced below:



Hammons Figure 2 is a cross-sectional view of a sanitary napkin 20 comprising “a liquid pervious topsheet 38, a liquid impervious backsheet 40, [and] an absorbent core 42 positioned between the topsheet 38 and backsheet 40” (Hammons, col. 3, ll. 16-21, & col. 4, ll. 58-61).

2. Hammons discloses:

the absorbent core 42 comprises three members: an acquisition member 44 which receives bodily discharges that have penetrated through the topsheet 38; a storage/distribution member 46 which draws bodily discharges from the acquisition

member 44, distributes them along its longitudinal length, and contains them; and an indicator member 48 which provides a visual signal to a wearer when the absorbent capacity of the sanitary napkin 20 is substantially exhausted.

(*Id.* at col. 4, l. 62, to col. 5, l. 3.)

3. Hammons also discloses that the topsheet 38 receives bodily discharges (*id.* at col. 5, ll. 8-12).

4. In addition, Hammons discloses that the “acquisition member 44 is intended to quickly collect and temporally hold bodily discharges, . . . and transport those bodily discharges to the underlying storage/distribution member 46” (*id.* at col. 7, ll. 43-48).

5. Hammons also discloses:

[T]he storage/distribution member 46 should have a higher average vertical wicking height in order to draw fluids from the acquisition member 44. Preferably, the ratio of the vertical wicking height of the storage/distribution member 46 to the vertical wicking height of the acquisition member 44 should be about equal to or greater than 1.5:1.

(*Id.* at col. 11, ll. 7-14.)

6. In rejecting claim 1, the Examiner considers Hammons’ topsheet 38 to be the acquisition layer of claim 1; Hammons’ acquisition member 44 to be the storage layer of claim 1; and Hammons’ storage/distribution member 46 and indicator member 48 to be the wicking layer of claim 1 (Ans. 3).

7. In rejecting claim 12, the Examiner refers to Hammons’ storage/distribution member 46 as the wicking layer (*id.* at 5).

8. “Acquisition” is defined as “[t]he act of acquiring.”³ “Acquire” is defined as “[t]o gain possession of.”⁴

9. “Storage” is defined as “[t]he act of storing goods or the state of being stored.”⁵

10. “Wick” is defined as “[a] piece of material that conveys liquid by capillary action.”⁶

11. Appellants do not define the terms “acquisition layer,” “storage layer,” or “wicking layer” in the Specification.

Principles of Law

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros., Inc. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987).

The interpretation of terms in a claim is a matter of law. *In re American Academy Of Science Tech Center*, 367 F.3d 1359, 1363 (Fed. Cir. 2004). “It is axiomatic that, in proceedings before the PTO, claims in an

³ “Acquisition” 2007, in *The American Heritage Dictionary of the English Language*, Houghton Mifflin, Boston, MA, viewed Nov. 9, 2009, <http://www.credoreference.com/entry/hmdictenglang/acquisition>.

⁴ “Acquire” 2007, in *The American Heritage Dictionary of the English Language*, Houghton Mifflin, Boston, MA, viewed Nov. 9, 2009, <http://www.credoreference.com/entry/hmdictenglang/acquire>.

⁵ “Storage” 2007, in *The American Heritage Dictionary of the English Language*, Houghton Mifflin, Boston, MA, viewed Nov. 9, 2009, <http://www.credoreference.com/entry/hmdictenglang/storage>.

⁶ “Wick” 2007, in *The American Heritage Dictionary of the English Language*, Houghton Mifflin, Boston, MA, viewed Nov. 9, 2009, <http://www.credoreference.com/entry/hmdictenglang/wick>.

application are to be given their broadest reasonable interpretation consistent with the specification.” *In re Sneed*, 710 F.2d 1544, 1548 (Fed. Cir. 1983).

“Without evidence in the patent specification of an express intent to impart a novel meaning to a claim term, the term takes on its ordinary meaning.”

Optical Disc Corp. v. Del Mar Avionics, 208 F.3d 1324, 1334 (Fed. Cir. 2000). “[T]he ordinary and customary meaning of a claim term may be determined by reviewing a variety of sources. Some of these sources include the claims themselves; dictionaries and treatises; and the written description, the drawings, and the prosecution history.” *Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1298 (Fed. Cir. 2003).

“[T]he same terms appearing in different portions of the claims should be given the same meaning unless it is clear from the specification and prosecution history that the terms have different meanings at different portions of the claims.” *Fin Control Systems Pty v. OAM, Inc.*, 265 F.3d 1311, 1318 (Fed. Cir. 2001).

Analysis

Hammons discloses an absorbent article comprising a layer 38, a layer 44 disposed beneath layer 38, and a layer comprising members 46 and 48 that is disposed beneath layer 44 (Findings of Fact (FF) 1-2). The Examiner considers these three layers, respectively, to be the acquisition, storage, and wicking layers of claim 1 (FF 6).

While we recognize that Hammons refers to layer 38 as a topsheet rather than an acquisition layer, refers to layer 44 as an acquisition layer rather than a storage layer, and refers to members 46 and 48 as a storage/distribution member and an indicator member, respectively, rather

than as together forming a wicking layer, the fact that the layers are referred to by different names in Hammons is not by itself sufficient to demonstrate that the layers cannot be referred to by the names given by the Examiner in rejecting the claims.

The term “acquisition” refers to the act of gaining possession of something (FF 8). Hammons discloses that the topsheet 38 receives bodily discharges (FF 3). Thus, the topsheet of Hammons would reasonably appear to be an acquisition layer.

Similarly, the term “storage” is defined as “[t]he act of storing goods or the state of being stored” (FF 9). Hammons discloses that the “acquisition member 44 is intended to quickly collect and temporality *hold* bodily discharges” (FF 4 (emphasis added)). Thus, it would reasonably appear that the acquisition layer of Hammons performs the function of a storage layer.

Finally, the term “wick” is defined as “[a] piece of material that conveys liquid by capillary action” (FF 10). Hammons discloses that “the storage/distribution member 46 should have a higher average vertical wicking height in order to draw fluids from the acquisition member 44” (FF 5). Thus, the storage/distribution member of Hammons reasonably appears to perform the function of a wicking layer.

Appellants do not define the terms “acquisition layer,” “storage layer,” or “wicking layer” in the Specification (FF 11) so we give these claim terms their ordinary meaning. Appellants have not adequately shown why layer 38 does not fulfill the requirements of an acquisition layer,

layer 44 does not fulfill the requirements of a storage layer, and members 46 and 48 do not together fulfill the requirements of a wicking layer.

With regard to claim 12, the Examiner refers to Hammons' storage/distribution member 46, rather than storage/distribution member 46 and indicator member 48, as the wicking layer (FF 7). Even assuming that this was not merely an oversight on the part of the Examiner, we do not agree that this is impermissible. Although the term "wicking layer" should be consistently interpreted for claims 1 and 12, it is not impermissible to rely on both storage/distribution member 46 and indicator member 48 to fulfill the limitations of the wicking layer of claim 1 and rely on only storage/distribution member 46 to fulfill the limitations of the wicking layer in rejecting claim 12. In addition, Appellants have not adequately shown why storage/distribution member 46 does not fulfill the requirements of the wicking layer of claim 12.

Conclusion

Appellants have not shown that the Examiner erred in finding that Hammons anticipates claim 1. We therefore affirm the anticipation rejection of claim 1. Claims 2-6, 10, and 11 have not been argued separately and therefore fall with claim 1. 37 C.F.R. § 41.37(c)(1)(vii).

Appellants also have not shown that the Examiner erred by considering different layers of Hammons' structure to fulfill the limitations of the same claim term in different independent claims. We therefore affirm the anticipation rejection of claim 12. Claims 13, 29, 30, 35, and 36 have not been argued separately and therefore fall with claim 12. 37 C.F.R. § 41.37(c)(1)(vii).

OBVIOUSNESS

The Examiner finds that “Hammons teaches a core with low rewet characteristics (col. 5, lines 17 - 19) but fails to associate a numerical value with the rewet characteristic” (Ans. 7). Relying on Georger and Aziz, the Examiner also finds that “it well known in the art that a low rewet value generally corresponds to a rewet value of less than 1 gram” (*id.*). The Examiner concludes that it would have been obvious “to consider the low rewet value of Hammons as being comparable to less than 1 gram since it has been established in the prior art that a low rewet value is equivalent to 1 gram or less” (*id.*).

Issue

Have Appellants shown that the Examiner erred in finding that Hammons suggests an absorbent core having a rewet value of about 3.0 g or less?

Findings of Fact

12. According to the Specification, “[r]ewet or flowback is the interstitial fluid held in an absorbent structure, which may be released back through the topsheet under pressure. Lower rewet relates to better dryness for the user of the product.” (Spec. 16-17.) The Specification also states that an “advantage of using a hardwood pulp wicking layer under an absorbent structure is in the improvement of rewet performance” (*id.* at 16).

13. Hammons discloses that the “topsheet 38 should exhibit . . . low rewet characteristics, permitting bodily discharges to rapidly penetrate the thickness of the topsheet 38 and move into the acquisition member 44 and sequentially into the storage/distribution member 46, but not flow back

through the topsheet 38 to the skin of the wearer” (Hammons, col. 5, ll. 16-23).

14. Georger discloses a “cushioned absorbent material comprising an apertured, film coated lofty nonwoven fabric provid[ing] . . . a low rewet value (less than 1 gm)” (Georger, col. 6, ll. 21-25).

15. Aziz discloses a diaper having a rewet value of 0.12 g. Aziz refers to this diaper as having “a low rewet value.” (Aziz, col. 6, ll. 35-46.)

Principles of Law

Under 35 U.S.C. § 103, “the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined.” *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).

Analysis

Hammons discloses an absorbent article having a low rewet characteristic (FF 13). Georger and Aziz provide evidence that one of ordinary skill in the art would consider a rewet characteristic of less than 1 gram to be a low rewet characteristic (FF 14-15). Thus, we agree with the Examiner that Hammons’ disclosure of a low rewet characteristic suggests a rewet value of about 3.0 g or less.

Appellants argue, however, that the “Examiner’s reliance on column 5, lines 17-19 is misplaced in that this specific excerpt is a description applying to the topsheet of Hammons, not to the absorbent core which is defined in Hammons as including the acquisition layer (44), storage layer (46), and the indicator layer (48)” (App. Br. 10). We are not

persuaded. As discussed above, the Examiner is considering Hammons' topsheet 38 to be the acquisition layer and therefore part of the absorbent core of claim 1 (FF 6).

Appellants also argue that the "Examiner has failed to provide clear motivation or suggestion to combine [Georger and Aziz with Hammons] to arrive at the claimed invention" (App. Br. 11). However, the Examiner is not combining these references and is instead using Georger and Aziz as evidence of what one of ordinary skill in the art would consider a low rewet characteristic, as described in Hammons (Ans. 10). Thus, the Examiner need not provide a reason to combine these references.

Conclusion

Appellants have not shown that the Examiner erred in finding that Hammons suggests an absorbent core having a rewet value of about 3.0 g or less. We therefore affirm the obviousness rejection of claim 7. Claims 8 and 9 have not been argued separately and therefore fall with claim 7. 37 C.F.R. § 41.37(c)(1)(vii).

SUMMARY

We affirm the anticipation rejection of claims 1-6, 10-13, 29, 30, 35, and 36 and the obviousness rejection of claims 7-9.

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

Appeal 2008-002545
Application 09/774,248

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